No. 01-1471

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN BASS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

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Respondent fails to undercut the government's central submission: The decision of the court of appeals warrants review and reversal because it directly contradicts two of this Court's decisions and unjustifiably interferes with the government's pursuit of a capital case as authorized by Congress and approved by the Attorney General. The court of appeals' decision flouts *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996), by affirming the discovery order despite respondent's failure to present any evidence that "similarly situated individuals of a different race were not prosecuted." The decision below also overrides *McCleskey* v. *Kemp*, 481 U.S. 279, 292, 294-295 & n.15 (1987), by relying on aggregate, national statistics as evidence of discrimination rather than requiring facts that bear on the individualized decisions of the prosecutors in this case.

Respondent does not defend the court of appeals' application of *Armstrong* but instead argues—incorrectly and contrary to the court of appeals' opinion—that *Armstrong*'s

similarly-situated requirement does not even apply in this case. Regarding *McCleskey*, respondent first simply repeats the court of appeals' unpersuasive refusal to apply *McCleskey* to the discovery stage, and then attempts unsuccessfully to distinguish *McCleskey* on grounds on which the court of appeals did not rely.

Respondent also offers several procedural arguments against review, including that this Court lacks jurisdiction because the case was not properly "in the court of appeals" as required by 28 U.S.C. 1254, that the case is not ripe for review, and that the case has few implications for other federal prosecutions. None of these assorted arguments, however, provides a persuasive reason why this Court should decline to review the court of appeals' decision, which defies precedents of this Court that provide critical protections against intrusion by the judiciary into the core prosecutorial function of the Executive Branch.

1. a. Respondent is unable to reconcile the court of appeals' decision with *Armstrong*. As explained in the petition (at 15-17), the court of appeals acknowledged that *Armstrong*'s similarly-situated requirement applies to respondent's case, but inexplicably found the requirement satisfied by statistics regarding individuals in the plea bargaining process. The plea bargaining statistics have no relevance to respondent's claim, which is that the government discriminated against him when it *charged* him for a capital-eligible offense. The plea bargaining statistics do not concern individuals who were not charged; rather, they concern individuals who were charged with capital-eligible offenses and against whom the Attorney General had already authorized the government to seek the death penalty.[1]

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[1] Respondent asserts that the government's contention that he declined a plea bargain is "highly debatable" (Br. in Opp. 18), but he nowhere challenges the government's more fundamental point that he "has never

Respondent makes no attempt to defend the court of appeals' reliance on the plea bargaining statistics or to explain how that reliance can be reconciled with *Armstrong*. Nor does respondent attempt to identify some other pool of similarly-situated defendants of another race that might satisfy *Armstrong*'s requirement. Instead, respondent makes the novel claim (Br. in Opp. 22-26) that there is an exception to *Armstrong*'s requirement when the government admits a discriminatory effect, and that former Deputy Attorney General Holder's statements at the press conference releasing the initial Department of Justice (DOJ) survey of capital cases (*DOJ Survey*) constituted such an admission.

The court of appeals, however, did not rely on an exception to *Armstrong*. On the contrary, the court held that the *Armstrong* requirement *does* apply to respondent's case, but that respondent satisfied it with statistics that have no relevance to the discriminatory conduct that he alleges. That contention cannot be defended.

Nor can respondent's new theory support the judgment, because there has been no governmental admission of discriminatory effect. *Armstrong* establishes that, in selective prosecution cases, "discriminatory effect" means that simi-

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claimed that he was not offered a plea bargain because of his race." Pet. 16. Indeed, respondent agrees that "the only question here is *charging*." Br. in Opp. 20. See Pet. App. 16a (Nelson, J., concurring in part and dissenting in part) (Respondent "is not alleging that the office of the U.S. Attorney for the district where his case is pending—the Eastern District of Michigan—declined to negotiate a plea bargain with him because of his race."). Respondent's own account of his withdrawal from his initial agreement to enter a plea bargain provides no support for any claim of racial discrimination in the government's interactions with him on the plea offer. See Br. in Opp. 1-2 & n.1 As for respondent's suggestion that his refusal to accept the government's plea offer was triggered by other governmental misconduct, *ibid.*, that accusation is both irrelevant and inaccurate. See Gov't Resp. and Br. in Opp. to Def. Mot. to Dismiss on Grounds of Prosecutorial Misconduct.

larly-situated individuals of another race were not prosecuted. 517 U.S. at 465. No federal official has *ever* stated that individuals *similarly situated to respondent* were not charged with capital eligible offenses. The former Deputy Attorney General's statement, based on the *DOJ Survey*, that blacks "are over-represented in those cases presented for consideration of the death penalty" was not a statement that *similarly situated* blacks and whites were treated differently. *DOJ Survey* 5. As carefully explained in the petition and in the report that accompanied the release of the *DOJ Survey*, that survey did "not include information regarding the entire pool of potential capital-eligible defendants," and therefore did not contain sufficient information from which to draw any such conclusion. *DOJ Survey* 10; see Pet. 14.[2]

b. Respondent also fails to explain how the court of appeals' decision can be reconciled with *McCleskey*. He reiterates (Br. in Opp. 19-20) the court of appeals' statement that *McCleskey* addressed a selective prosecution claim on the merits while this case is at the discovery stage. But he fails to explain how that difference negates the applicability of *McCleskey*'s holding that statistics that aggregate independent decisions by multiple prosecutors are not evidence that any particular prosecutor acted with discriminatory purpose. Although respondent need only show "some evidence" of discrimination "to obtain discovery," *Armstrong*, 517 U.S. at 468, 469, *McCleskey* requires that this evidence

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[2] The former Deputy Attorney General's statement in this case that blacks are over-represented in capital cases is no different than the government's statement in *Armstrong* that more than 90% of those sentenced for crack cocaine trafficking in 1994 were black. See 95-157 U.S. Br. at 30 (citing sentencing statistics). As the Court explained in *Armstrong*, such over-representation is not equivalent to the disparate effect that is essential to support a claim of selective prosecution. See 517 U.S. at 469-471.

tend to prove that "the decisionmakers in *his* case acted with discriminatory purpose." 481 U.S. at 292. Respondent has offered no evidence that meets that requirement.

Respondent argues (Br. in Opp. 20-22) that *McCleskey* is inapplicable here because, unlike in *McCleskey*, all the prosecutors whose decisions are reflected in the *DOJ Survey* work for the Department of Justice. Respondent argues that the Attorney General controls all those prosecutors, and respondent points to the protocols regulating federal capital charging as "a striking illustration of this centralized power." *Id.* at 21. The court of appeals, however, did not even purport to distinguish *McCleskey* on that ground. On the contrary, the court of appeals stated that "*McCleskey* will certainly preclude [respondent's] selective prosecution claim if, at the end of discovery, he fails to show any additional evidence" of discrimination beyond the *DOJ Survey* statistics. Pet. App. 14a.

Respondent's attempted distinction of *McCleskey* is also lacking in merit. The protocol that governed the charging process in this case, and in the other cases included in the *DOJ Survey*, vested the decision whether to charge a defendant with a capital-eligible offense in the individual United States Attorneys, not in the Attorney General. Pet. 3. Respondent has offered no evidence that the Attorney General or any other Justice Department official exercised control over the charging decisions of the individual prosecutors, contrary to the stated policy in the protocol. Moreover, the statistics in the *DOJ Survey* categorically refute any claim that the former Attorney General was herself discriminating against minorities in her decisions on the death penalty, see Pet. 15, and respondent makes no such claim here.[3]

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[3] Respondent errs in contending (Br. in Opp. 22) that the government's position in *United States* v. *Llera Plaza*, 181 F. Supp. 2d 414 (E.D.

2. Respondent's various procedural objections to this Court's review also lack merit.

a. Respondent incorrectly contends (Br. in Opp. 4-10) that this Court lacks jurisdiction to review this case on certiorari because it was never properly "in the court of appeals" as required by 28 U.S. 1254. Respondent never questioned that the case was properly before the court of appeals until his brief in opposition in this Court. He did not address the jurisdictional issue before the panel or in response to the petition for rehearing en banc, even though the government briefed the issue in detail, Gov't C.A. Br. 2, 13-

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Pa. 2002), is inconsistent with its position in this case. The prosecutorial decision challenged in *Llera Plaza* was the decision to authorize the death penalty. *Id.* at 414-415. The government took the position that such a claim should be characterized as an attack on the Attorney General's action since the Attorney General alone authorizes pursuit of a death sentence; accordingly, the government argued that all cases in which the Attorney General made that decision are relevant to an allegation that she discriminated. Gov't Opposition to Defendant's Motion to Bar the Death Penalty Due to Alleged Racial Discrimination at 9-10 & n.12 (filed Sept. 14, 2001); see 181 F. Supp. 2d at 420. Here, in contrast, the decision at issue—whether to charge respondent with a capital-eligible offense in the first instance—was not made by the Attorney General but by the U.S. Attorney for the Eastern District of Michigan. Independent decisions by other U.S. Attorneys whether or not to charge defendants in other districts are not relevant to whether the U.S. Attorney for the Eastern District of Michigan discriminated against respondent. Indeed, the court in *Llera Plaza* held that "it makes good sense to regard the practices of a particular district as the primary area of inquiry" even where the defendant challenges a decision to seek the death penalty, 181 F. Supp. 2d at 421, because the court concluded that recommendations to seek the death penalty by a U.S. Attorney have a high correlation with the Attorney General's ultimate decision. *Ibid.* Whether or not that analysis is correct when analyzing decisions to seek the death penalty, it plainly applies when the challenge is to a *charging decision* that is vested with the U.S. Attorney and in which other districts and the Attorney General are not involved.

18, and the court of appeals addressed the issue in its opinion, Pet. App. 4a-5a. Respondent's failure to question the jurisdiction of the court of appeals is not surprising, because every circuit that has addressed the issue has concluded that the courts of appeals have jurisdiction under 18 U.S.C. 3731 to review the dismissal by a district court of the government's notice of intent to seek the death penalty. Pet. App. 4a-5a; *United States* v. *Acosta-Martinez*, 252 F.3d 13, 16-17 (1st Cir. 2001); *United States* v. *Cheely*, 36 F.3d 1439, 1441 (9th Cir. 1994); *United States* v. *Woolard*, 981 F.2d 756, 757 (5th Cir. 1993).

Section 3731 authorizes the government (except where precluded by the constitutional protection against double jeopardy) to appeal from any order of a district court "dismissing an indictment or information * * * as to any one or more counts" or "suppressing or excluding evidence." Section 3731 further states that its "provisions * * * shall be liberally construed to effectuate its purposes," which, this Court has repeatedly explained, are "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, 420 U.S. 332, 337 (1975); see *United States* v. *Loud Hawk*, 474 U.S. 302, 313 (1986); *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977).

Dismissal of a death penalty notice acts as a partial dismissal of the indictment for a capital offense, because the grand jury's indictment for such an offense includes an implicit authorization to pursue the statutorily authorized penalty of death. The death penalty notice is the supplemental charging document through which the government signals its intent to avail itself of that authorization. 18 U.S.C. 3593(a). Dismissal of the death penalty notice not only prevents the government from seeking the death penalty but nullifies the grand jury's decision to charge the

defendant with a capital-eligible offense and thus narrows the authorization granted by the grand jury's indictment.

Even if the court of appeals lacked jurisdiction under Section 3731, the case would still have been properly in the court of appeals because the government also sought review by way of mandamus. See Gov't C.A. Br. 2, 16-18; *Acosta-Martinez*, 252 F.3d at 17 (relying on mandamus as alternative basis to review dismissal of death penalty notice); *Cheely*, 36 F.3d at 1441 n.1 (same). See generally *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976) (mandamus appropriate when "the party seeking issuance of the writ ha[s] no other adequate means to attain the relief he desires").

b. Respondent also errs in arguing (Br. in Opp. 11-19) that this case is not ripe for review because the government did not submit the requested documents for *in camera* inspection and final resolution of claims of privilege, irrelevance, or undue burden. That argument overlooks that the district court determined, even before the court of appeals issued its decision, "that any privileges that may have attached to the materials were outweighed by the constitutional interests implicated by [respondent's] allegations." Pet. App. 4a; see 10/24/00 Tr. 48, 50. There was no reasonable likelihood that the district court would reconsider that decision on remand.

Respondent's ripeness concerns are unfounded in any event, because the government has not raised any claims of privilege, irrelevance, or undue burden in this Court, and the claims that the government has raised would not be clarified in any way by *in camera* review. The government presents two claims: (1) that respondent is not entitled to discovery absent a showing that similarly-situated defendants of another race were not charged with capital-eligible crimes; and (2) that respondent cannot rely on national statistics that aggregate the independent charging decisions of multiple

federal prosecutors. Respondent fails to explain how the content or volume of the documents that petitioner seeks bears on the resolution of either of those claims.

Respondent incorrectly contends (Br. in Opp. 12-13) that the government is pressing its privilege and undue burden claims in this Court by the subterfuge of using other names for those contentions. In fact, however, the government has argued that the Court's review of the questions presented is *important* because the discovery order requires the production of voluminous and sensitive internal documents that discuss prosecutorial decisionmaking, and it therefore trenches on core executive powers. See Pet. 12, 20-23. But that argument is not tantamount to raising substantive claims of privilege and undue burden.

c. Finally, respondent asserts (Br. in Opp. 26-29) that the court of appeals' affirmance of the discovery order has limited importance for future prosecutions because the factual context in which the case arose has been altered by supplemental data (the *DOJ Supplemental Survey*) that clarify that race does not improperly influence federal capital charging decisions and by changes in DOJ procedures. But the government provided the *DOJ Supplemental Survey* to the court of appeals. Although respondent questioned whether submission of the survey was permitted under Federal Rule of Appellate Procedure 28(j), respondent addressed the survey in detail in a supplemental memorandum and "indicated that he had no objection" to the court of appeals' consideration of the survey "in its deliberation on this case" because it is "in the public record" and "bear[s] on the issue to be decided." Supp. Mem. for John Bass 1. The court of appeals nevertheless affirmed the discovery order and gave no indication that the supplemental survey made any difference to the analysis. As for the changes in DOJ procedures, respondent has not offered any reason to believe

that they have materially altered the statistical picture reflected in the DOJ surveys.

More fundamentally, regardless how many cases share the same factual context as this one, the legal errors made by the court of appeals have far-reaching implications for any case in which a defendant seeks discovery based on a claim of selective prosecution. The court of appeals held that a defendant who seeks discovery can make the required showing—that similarly-situated individuals of a different race were not prosecuted—by pointing to differential treatment that is wholly irrelevant to the discriminatory conduct that the defendant alleges. In addition, the court held that a defendant can make the prima facie showing of discriminatory intent necessary to justify discovery through aggregate statistical data of the sort that this Court has held insufficient to create an inference of purposeful discrimination. Taken together, those legal rulings eviscerate the "rigorous standard" for discovery formulated in *Armstrong*, 517 U.S. at 468. Unless this Court intervenes, the decision of the court of appeals thus threatens the very unwarranted intrusion on "the performance of a core executive constitutional function" that the *Armstrong* standard was specifically designed to prevent. *Id.* at 465.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted, and the decision of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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